LIBRARY
SUPREME COURT, U. S.

FILED
APR 4 1969
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM 1968

No. 1128

CONSOLIDATED COPPERSTATE LINES, *Appellant,*

v.

THE UNITED STATES OF AMERICA, ET AL, *Appellees.*

No. 1141

STRICKLAND TRANSPORTATION CO., INC., *Appellant,*

v.

THE UNITED STATES OF AMERICA, ET AL, *Appellees.*

On Appeal from the United States District Court for the Central District of California

MOTION TO AFFIRM

CARL L. PHINNEY,
4555 First National Bank Bldg.,
Dallas, Texas 75202,

Counsel for Herrin Transportation Company, Appellee.

April, 1969

THE WARLICK PRESS DIVISION, STECK-WARLICK CO.
P. O. BOX 10543 — 1455 ROUND TABLE DRIVE — DALLAS — ME 1-3130

SUBJECT INDEX

	Page
Statement	2
Argument	7
Conclusion	14

Page

Cases

Acme Cartage Co. v. United States, 290 F. Supp. 453 (D.C. Wash. 1968) 13

Consolidated Freightways Corp. of Del. — Control — Southern Plaza Exp., Inc., 104 M.C.C. 194 13

Gilbertville Trucking Co., Inc. v. United States, 371 U.S. 115, 127 (1962) 7, 8, 13, 14

Interstate Commerce Commission v. Parker, 326 U.S. 60 (1945) 13

McLean Trucking Co. v. United States, 321 U.S. 67, 86-88 7

NLRB v. Mall Tool Co., 119 F. 2d 700, 702 (C.A. 7, 1941) 13

Schwabacher v. United States, 334 U.S. 182, 193 7

United States v. Pierce Auto Freight Lines, 327 U.S. 515 (1946) 14

Virginian R. Co. v. United States, 272 U.S. 658, 666 (1926) 13

Western Papermakers' Chemical Co. v. United States, 271 U.S. 268, 271 (1926) 13

Other Authorities

49 U.S.C. §5 ..... 3, 6, 12, 13

§5(2) 3

§5(2)(c) 8

§5(4) 8, 13

49 U.S.C. §307 (Interstate Commerce Act) 3

§307(a) 6

In the

Supreme Court of the United States

OCTOBER TERM 1968

No. 1128

CONSOLIDATED COPPERSTATE LINES,

Appellant,

v.

THE UNITED STATES OF AMERICA, ET AL,

Appellees.

No. 1141

STRICKLAND TRANSPORTATION CO., INC.,

Appellant,

v.

THE UNITED STATES OF AMERICA, ET AL,

Appellees.

On Appeal from the United States District Court for the Central District of California

---

MOTION TO AFFIRM

Pursuant to Rule 16.1.(c), THE SUPREME COURT OF THE UNITED STATES REVISED RULES (1967), Herrin Transportation Company, Appellee, moves that the judgment of the District Court be affirmed.

STATEMENT

Appellee, Herrin Transportation Company, is a party of record and has a justiciable interest in both Cause No. 1128, appeal of Consolidated Copperstate Lines (hereinafter referred to as Appellant Copperstate) and Cause No. 1141, appeal of Strickland Transportation Co., Inc. (hereinafter referred to as Appellant Strickland). Appellee Herrin Transportation Company consolidates its motion to affirm in Cause No. 1128 and Cause No. 1141 based on the previous procedure of handling of the cases by the Interstate Commerce Commission and the Federal District Court for the Central District of California. Citations to Appellant Copperstate's jurisdictional statement will be referenced (J.S.C.) and citations to Appellant Strickland's jurisdictional statement will be referenced (J.S.S.).

This case involves direct appeals from a final judgment (J.S.C. App. A 1-5; J.S.S. App. A 1a-5a) of a 3-Judge District Court affirming orders of the Interstate Commerce Commission (J.S.C. App. B 6-52; J.S.S. App. C 8a-40a) in an action brought by Appellants Copperstate and Strickland to set aside such orders.

The background of the case is adequately stated in the report of the Commission (J.S.C. App. B 7-9) and only brief excerpts will be restated in this motion for clarity. Appellant Copperstate filed a joint application with England Transportation Company, a Louisiana corporation, and England Transportation Company of Texas, a Texas corporation, seeking authority under §5 of the Interstate Com-

merce Act, 49 U.S.C. §5(2) for the purchase by Appellant Copperstate of certain operating rights and property of England (La.) and all of the operating rights of England (Tex.) for a total price of $400,000.00. The England (La.) and England (Tex.) authority sought to be acquired by Appellant Copperstate is set out in detail in the Commission's report (J.S.C. App. B 21; 12). In a matter alleged by Appellant Copperstate to be directly related Copperstate was applicant under a §207 proceeding of the Interstate Commerce Act, 49 U.S.C. 307, seeking to operate over regular routes, in the same area as a portion of the irregular route operating rights to be acquired. The territory covered by Appellant Copperstate's §207 application is set out in Appendix B to its jurisdictional statement at pages 21 and 22. To the extent Appellant Copperstate by its §207 application seeks authority westbound from Lake Charles, Louisiana, to Houston, Texas, it is one for new authority since England (Tex.) holds no like authority (J.S.C. App. B 22).

Appellant Strickland filed a joint application with England (La.) seeking authority under §5 of the Interstate Commerce Act, 49 U.S.C. §5(2), for the purchase by Appellant Strickland of certain operating rights of England (La.) for $495,000.00. A description of the authority sought to be purchased by Appellant Strickland is contained in the Commission's report (J.S.C. App. B 17). In a directly related matter, Appellant Strickland filed an application under §207 of the Interstate Commerce Act, 49 U.S.C. §307, seeking to convert a portion of the operating rights sought to be acquired from irregular route to regular route operations. A

description of the authority sought by Appellant Strickland in the §207 proceeding is contained in the Commission report (J.S.C. App. B 18-19).

The applications of Appellants Copperstate and Strickland were denied by the entire Commission (J.S.C. App. B 6-52). In support of its denial of the subject applications, the Commission found:

(1) Strickland conducted operations in an unlawful manner including unlawful interchange and unlawful cross-hauling; (J.S.C. App. B 34)

(2) Strickland did not discharge its burden of proving England (La.) as vendor performed substantial and lawful movements under the rights involved in the transaction; (J.S.C. App. B 34-35)

(3) Vendor England (La.) and vendee Appellant Strickland both conducted unlawful operations and conducted them not under color of right or under any honest belief that they were lawful and there was no overriding public need established for the proposed lawful future operations; (J.S.C. App. B 35)

(4) The testimony of shippers supporting the application of Appellant Strickland did not establish any public convenience and necessity such as to mitigate or excuse the unlawfulness of England (La.) and Appellant Strickland in their joint operations; (J.S.C. App. B 36)

(5) Conversion of a portion of England's irregular route rights to regular route would create an entirely new and different service which would clearly have an adverse effect on the existing competitive situation; (J.S.C. App. B 37)

(6) Appellant Strickland's §207 application was made directly related to and contingent upon approval of the §5 application and, therefore, must be denied; (J.S.C. App. B 37-38)

(7) In connection with the Appellant Copperstate, westbound operations from the Texas-Louisiana state line to Houston were conducted by England (Tex.) without authority and were unlawful; (J.S.C. App. B 41)

(8) The service performed by the England companies between Houston and New Orleans, whether lawfully or unlawfully, clearly established that when compared with the proposed utilization of said operating rights by Appellant Copperstate would result in a new and totally different service by vendee; (J.S.C. App. B 42)

(9) England (La.) has operated an unlawful cross-radial haul of New Orleans on traffic bound from Baton Rouge to Houston and Appellant Copperstate continued such unlawful movements thereby raising a serious question concerning the fitness of Appellant Copperstate; (J.S.C. App. B 42-43)

(10) With respect to the §207 application, lack of need shown for an extension of Appellant Copperstate's authority coupled with the questionable aspect of its fitness in conducting temporary operations impels denial of the application for new authority. Supporting shippers have not established a need for any service that cannot be supplied by existing carriers. (J.S.C. App. B 47-48)

In connection with the Court's consideration of the jurisdictional statements filed by Appellants Strickland and Copperstate, brief reference is necessary to focus attention on the chronological sequence of steps in this case. In October, 1964, the Commission granted temporary authority "pending the determination" by the Commission of the applications for Appellants Strickland and Copperstate to purchase the involved operating rights. Operations under such *temporary authority* were commenced in 1964 and have been continued until this date. The subject applications under 49 U.S.C. §5 to purchase such operating rights (finance applications) and under 49 U.S.C. §307(a) (extension applications) were heard on consolidated record by a hearing examiner of the Commission, protested by numerous motor carrier appellees and continued for many weeks. The examiner recommended the grant of the applications (J.S.C. App. C). After due consideration of the record and briefs of the parties, the *entire Commission* denied the applications (J.S.C. App. B). After petitions for reconsideration were denied Appellants appealed to the

United States District Court, Central District of California, which granted a temporary restraining order against the enforcement of such order of denial pending trial on the merits. Ultimately, the 3-Judge District Court on December 2, 1968, affirmed the Commission's denial in a unanimous opinion (J.S.C. App. A). On December 12, 1968, the Interstate Commerce Commission entered its order giving effect to the decision of the Court and making the effective date of its prior denial February 10, 1969. Appellants sought a stay from the 3-Judge Court pending appeal to this Court which was denied on January 27, 1969. On February 4, 1969, Mr. Justice Harlan issued his memorandum and order staying the order of the Commission of December 12, 1968, pending this Court's action on the jurisdictional statements.

ARGUMENT

The decision below is correct and it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

1. The controlling principle in the instant proceeding is the one well established by the Interstate Commerce Commission and this Supreme Court as stated in *Gilbertville Trucking Co., Inc. v. United States*, 371 U.S. 115, 127. See also *McLean Trucking Co. v. United States*, 321 U.S. 67, 86-88; *Schwabacher v. United States*, 334 U.S. 182, 193. In the *Gilbertville* case, the applicants argued before the Supreme Court that the Commission had denied the §5 application automatically upon determining that a violation of

§5(4) existed without giving consideration to approval notwithstanding the violation if the application was consistent with the public interest. Chief Justice Warren in speaking for the Court and rejecting applicants' arguments stated:

> The statute entrusts the Commission with the duty to decide what considerations other than those specifically mentioned in §5(2)(c) shall be given weight.

This Court went on to recognize that the Commission had chosen to give weight to the applicants' fitness and that integral to a determination of fitness is the applicant's willingness and ability to fulfill its obligations to the Commission, considerations which could be demonstrated by past or continued violation of Commission regulations. The applicants were vigorous in their argument before this Court in the *Gilbertville* case that in spite of the §5(4) violation they had a right to have the applications considered and approved and charged the Commission had raised the §5(4) violation as an automatic bar to approval of the subsequent merger. In the *Gilbertville* case it might be noted the trial examiner actually found that the violation was neither willful, flagrant nor the result of persistent disregard for regulations. This Court, notwithstanding the vigorous argument of applicants, found that even though a rule may be automatic it is not necessarily arbitrary. This Court concluded that the Commission's rule is not automatic and will give way to a clear showing of public interest but found the appellants before the Bar in the *Gilbertville* case had failed to make such a clear showing of public interest. The order denying the merger was affirmed. Appel-

lants Strickland and Copperstate are faced with the additional fact that the Commission, upon due consideration of the entire history surrounding the subject certificates, found the existence of an element of willfulness in the unlawful operations conducted by the England Companies and the Appellants.

The Commission is the expert in this field and it has carefully considered the actions of the England Companies, Appellant Strickland and Appellant Copperstate. The proper statutory criteria have been applied and Appellants have been found wanting in several material respects. Appellants seek to emphasize the gravity of their loss if the Commission's order stands. Appellee Herrin recognizes the importance of this case to Appellants Strickland and Copperstate. The case is equally important to the course of orderly administration of the Interstate Commerce Act, as well as the competitive position of Appellee Herrin and other participating carriers. Appellants' cause, as the Commission and Federal District Court recognized, cannot be bolstered by unlawful operations conducted over a long period of time under temporary authority pending consideration and final determination of this case by the Commission and their manifest failure to discharge their burden under established criteria for judging cases of this nature.

2. Appellant Strickland contends that one question presented to this Court is whether or not the Commission erred in holding that the equipment interchange conducted by England (La.) — Strickland between Shreveport and New

Orleans was unlawful. This is not a substantial question which requires consideration by this Court. The Court can readily see from studying the Commission's order (J.S.S. App. C 25a-28a) that the Commission gave full and adequate consideration to the facts of record concerning the Shreveport-New Orleans interchange operations of Appellant Strickland and England (La.). The simple fact is the unlawful operations were conducted, the Commission has so concluded, and the determination has been made by the Commission that sufficient evidence of an overriding public need does not exist in the record. Admittedly, Appellant Strickland does not agree with the Commission and lower Court's determination but mere difference of opinion concerning importance and construction to be given facts existing between Appellant Strickland, on the one hand, and the Interstate Commerce Commission and the lower Federal District Court, on the other, does not present a substantial question for consideration by this Court.

3. Appellant Strickland also complains of the failure of the Commission to approve the purchase by Strickland of England's Monroe-New Orleans operating rights. Its rationale is difficult to understand but, apparently, the contention is that the hearing examiner took it upon himself to recommend the conversion of the irregular authority for which Strickland had applied to regular authority and Appellant Strickland suffered some injury by this recommended conversion since the Commission allegedly considered this part of the case *only* on the basis recommended by the examiner. The Commission's report (J.S.S. App. C 29a-30a)

points out the fallacy of Appellant Strickland's contention. Appellant Strickland would have this Court believe that if the examiner had not taken it upon himself to recommend a conversion of certain irregular route authority to regular route authority, the Commission would have clearly been compelled to approve this portion of the application. This is not the fact. The facts establish the examiner was faced with an impossible situation concerning the proposed transfer of these irregular route rights since the operations conducted thereunder were unlawful and bore no similarity to the nature of the underlying certificate issued by the Interstate Commerce Commission. To solve the impasse, the examiner came up with the "ingenious" solution about which Appellant Strickland now complains before this Court. A cursory reading of the Commission's detailed discussion of this matter establishes that under neither set of circumstances would approval be warranted.

4. Appellant Strickland, lastly, asserts the rather standard argument that it was not afforded procedural due process and that the case was actually decided on the basis of issues not raised by the parties or before the Commission. This argument of Appellant Strickland is, in the opinion of Appellee Herrin Transportation Company, more illusory than real since the principal basis on which this case was decided by the Commission was the conduct of unlawful operations by the parties to the applications before the Commission and the complete failure of the applicants to discharge their burden with respect to established criteria, including failure to establish public convenience and neces-

sity or an overriding public need requiring the granting of the applications in the face of the unlawful operations and apparently willful violations of established Commission rules and regulations. These issues were clearly indicated from the inception of this case.

5. Appellant Copperstate complains (J.S.C. App. A 9-12) that the Commission compartmentalized and segregated the evidence in the §5 finance application from the evidence in the §207 extension of operating rights application and did not consider the operations of Appellant Copperstate under temporary authority nor consider all of the evidence in the record as a whole in the disposition of both applications. This argument will not stand the test of due reflection and a complete reading of the Commission's report in context establishes the contrary. The Court below has correctly stated the facts with respect to this contention made by Appellant Copperstate (J.S.C. App. A 5). The Commission considered the applications in one report and order and "did not separate item by item the findings in regard to each application." The Court went on to find that form does not govern substance and the Commission's findings in the §207 proceeding are fully applicable to the same issues in the §5 matters. The Commission, in fact, first considered all of the evidence in both applications, the illegality of Appellants' operations and the concept of new and differing service under the involved operating rights as bearing on the statutory concept of public interest (J.S.C. App. B 41-43). Appellant Copperstate's objection to the form of the report is without substantial merit and should not form the basis

for review by this Court. *Interstate Commerce Commission v. Parker*, 326 U.S. 60 (1945); *Gilbertville Trucking Co. v. United States*, 371 U.S. 115 (1962).

6. Appellant Copperstate finally complains (J.S.C. 12-15) that the Commission adopted standards in the determination of its applications differing from those in *Consolidated Freightways Corp. of Del. — Control — Southern Plaza Exp., Inc.*, 104 M.C.C. 194. It contends this departure results in arbitrary and capricious action and cites *Acme Cartage Co. v. United States*, 290 F. Supp. 453 (D.C. Wash. 1968) and *NLRB v. Mall Tool Co.*, 119 F. 2d 700, 702 (C.A. 7, 1941). The *Acme* case concerned unpredictable enforcement of *rules* in which no discretion was involved and, therefore, is not relevant to a determination of this case. This argument by Appellant Copperstate is rebutted by such cases as *Virginian R. Co. v. United States*, 272 U.S. 658, 666 (1926) and *Western Papermakers' Chemical Co. v. United States*, 271 U.S. 268, 271 (1926). Those cases stand for the well-established proposition of this Court that doctrines of res judicata or stare decisis do not apply to decisions of the Interstate Commerce Commission and this Court will not concern itself with the alleged inconsistency by the Commission in deciding two cases involving different parties, facts and circumstances. In the *Freightways* case, the Commission actually found there was a technical violation of §5(4) because Freightways already had the power to control Southern Plaza and that it would retain that power even if the §5 application were denied. The Commission went on to determine it should give approval to the trans-

action because of the significant public interest factor existing in the circumstances. No such circumstances exist in the present proceeding and the applicable principle properly utilized by the Commission is the one previously referred to herein and contained in the *Gilbertville* case.

7. Appellants Strickland and Copperstate have found areas of disagreement and dissatisfaction with the decision of the Commission and the Court below. Appellee, Herrin Transportation Company is firm in its belief that the Commission has acted in a proper exercise of discretion allowed by this Court under decisions such as *United States v. Pierce Auto Freight Lines*, 327 U.S. 515 (1946).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

CARL L. PHINNEY,
4555 First National Bank Bldg.,
Dallas, Texas 75202, 741-6263,
Counsel for Herrin Transportation Company, Appellee.

Wm. E. Livingstone, III and
Phinney, Hallman, Pulley & Livingstone
4555 First National Bank Building
Dallas, Texas 75202, 741-6263
Of Counsel

DATED: April, 1969